

MEMORANDUM

TO: Board of Environmental Protection

FROM: Judy Gates & Don Witherill, Bureau of Land & Water Quality, Augusta

DATE: November 4, 2004

RE: Provisional Adoption of Chapter 500, Stormwater Management, and Chapter 502, Direct Watersheds of Lakes Most at Risk from New Development and Urban Impaired Streams:

Statutory and Regulatory Reference: The applicable regulatory framework for this rule is the Stormwater Management Law (Stormwater Law) 38 M.R.S.A. § 420-D.

Scope: This rule applies to (A) a project that requires a Stormwater permit pursuant to 38 M.R.S.A. § 420-D, (B) a development that may substantially affect the environment and requires a Site Location of Development (Site Law) permit pursuant to 38 M.R.S.A. §§ 481 - 490 and (C) certain projects that may be eligible for license by rule for the infiltration of stormwater pursuant to 38 M.R.S.A. § 413.

Description: The department requests that the Board provisionally adopt Chapter 500, Stormwater Management, and Chapter 502, Direct Watersheds of Lakes Most at Risk from New Development and Urban Impaired Streams. Chapter 500 will be a repeal and replace of the existing chapter; Chapter 502 will be a revision of the existing chapter. No other revisions have occurred to these chapters since they became effective on December 31, 1997.

Background: The Maine Department of Environmental Protection is proposing revisions to Chapters 500 and 502 affecting how stormwater is regulated in the State of Maine. The changes will improve the regulatory program and satisfy the requirements of 2003 Public Law Chapter 607 that was enacted by the second regular session of the 121st Maine Legislature. Chapter 607 allows the Board to adopt changes that do not conform to existing statutory language in Title 38, Section 420-D, Stormwater Management Law. Rules must be provisionally adopted and submitted to the Legislature no later than January 2, 2005. In addition, the Department must submit a bill to the First Regular Session of the 122nd Legislature no later than January 2, 2005 to amend existing Section 420-D to resolve inconsistencies between that statutory provision and the provisionally adopted rules.

Environmental Issues: Several factors have led the department to conclude that revisions to the program are needed. First, experience in administering the existing program has demonstrated that stormwater is a complicated program to manage. The existing rules have been confusing for both the regulated public and for the department staff in charge of administering it, with multiple review thresholds and standards. Second, the existing rule does not even include all the “most at risk” areas that were envisioned when the rule was originally adopted. In particular, a complete list of “most at risk” rivers and streams has not been established. Originally, the department lacked sufficient data to compile such a list. Now the department has data that would allow a list to be established. However, doing so would add even more complexity to the program. Third, the existing program, as it currently operates, is not providing water quality protection for Maine’s most pristine waters and creates an incentive for developers to locate in “cleaner” watersheds where the regulatory requirements would be less. And fourth, federal stormwater rules have gone into effect over the past eighteen months, which add to complexity of stormwater requirements overall.

A stakeholder group was convened to help the department address these concerns. While the group did not reach consensus on the proposed rules, general agreement was reached on guiding principles, which the department has attempted to follow. The guiding principles and how they are met by the proposed changes are described below.

1. Stormwater standards should result in meaningful protection. They should accomplish protection without unnecessary requirements; they should be achievable, cost-effective and based on good science.

The proposed revisions will provide more effective and meaningful protection by streamlining the rules into one set of standards focused on the protection of water quality. Flexibility is built into the rule. A variety of treatment options are available to meet standards and, in some cases, provisions are built in for compensation fees and mitigation, providing flexibility without sacrificing protection.

2. Stormwater standards should not foster an unintended consequence of sprawl, as defined by state policy.

The standards proposed in these rules will not foster an unintended consequence of sprawl because quality standards will apply everywhere, not only in watersheds already facing challenges to water quality, eliminating differential regulation based on location. Treatment will be provided in watersheds of pristine waters as well as waters in more developed watersheds, protecting all of Maine's waters equally. Although there are additional treatment requirements for large projects in urban impaired stream watersheds, the rules provide flexibility for meeting the requirements through a compensation fee or through off-site or on-site mitigation.

3. Stormwater standards should be understandable. They should be comprehensible and written in plain English. They should not be unnecessarily complex.

The language and organization of the rule have been changed substantially to improve understandability by both the regulated community and department staff. A single threshold of one acre of disturbance eliminates multiple, and sometimes confusing, thresholds for jurisdiction. An accompanying flowchart will reflect cascading standards that may apply to a project.

4. Stormwater standards should not conflict with other major environmental initiatives.

These rules will not conflict with other major environmental initiatives. Quality treatment in all watersheds will contribute a measure of protection not currently provided and forestall water quality degradation resulting from untreated stormwater runoff. Protection has been added for urban impaired streams while retaining designations for most at risk lakes to provide protection for these more eminently threatened resources.

The Board held a public hearing on the draft rules in Augusta on August 19, 2004. At that hearing, and in written comments received into the record, the revised rules were generally supported. However, specific comments addressed several areas of concern. Attached to the rules proposed for adoption are copies of the comments received into the public record and the Basis Statement, which details the specific comments received into the public record and the Department's responses to those comments. In addition, attached is a strike out and underlined version of the rules incorporating a number of minor changes in response to comments received into the public record. These changes include:

- Clarification of types of developed area as consisting of either impervious area or landscaped area and their differential treatment through minor changes in wording;
- Addition of an exception from the BMP standards for redevelopment of existing impervious areas (Section 4(B)(1)(c)(v)) and the urban impaired stream standard (Section 4(C)(3)(b));
- Addition of an exception from the urban impaired stream standards for developed areas that are neither impervious or landscaped (Section 4(C)(3)(a));
- Addition of Section 10-A, which describes conditions of approval for site law projects relating to the recertification requirement;
- Grammatical changes, minor editing changes, and deletion of repeated text to improve clarity

Legislation was enacted by the Legislature requiring that the draft Stormwater Management Rules be considered major substantive rules. Consequently, the Board must adopt these rules on a provisional basis. The provisionally adopted rules will be considered by the 122nd Legislature during its first session before being remanded back to the Board for final adoption.

Improving the effectiveness of stormwater management in Maine relies largely on providing an effective and understandable regulation. Together, stakeholders and department staff have crafted a regulation that will provide increased protection for the water quality of Maine's protected natural resources, while simplifying the permit process.

Department Recommendation: The department recommends the Board provisionally adopt the revised Chapters 500 and 502.

Estimated Time of Presentation: Approximately 45 minutes.